A

LIM LEK YAN

v.

YAYASAN MELAKA

B

HIGH COURT MALAYA, KUALA LUMPUR
LEE SWEE SENG JC
[SUIT NO: D-22NCC-1823-211-2011]
18 JUNE 2012

C ***CIVIL PROCEDURE:*** *Action - Cause of action - Plaintiff attempting to relitigate after accepting judgments - Whether recourse lay in appeal - Whether plaintiff had cause of action - Whether plaintiff's actions offended principles of res judicata - Whether action scandalous, frivolous and vexatious - Whether an abuse of court process*

D ***CIVIL PROCEDURE:*** *Action - Multiplicity of actions - Acceptance of summary judgment and subsequent filing of suit to set aside summary judgment - Whether constituted attempt to relitigate issues already decided - Whether an abuse of court process*

E The plaintiff was a shareholder and director of Photran Corporation Sdn Bhd ("Photran"). The defendant ("Yayasan") was a body corporate holding 70% of the issued share capital of Photran. The defendant agreed to be a joint venturer in Photran to manufacture and market high performance optical and electricity F conductive film coated products. The defendant granted Photran a loan of RM9.2 million to be repaid within 24 months and a loan agreement was signed by the parties to that effect. The plaintiff agreed to indemnify the defendant in the event that Photran failed to repay the loan. The defendant commenced a suit in 2003 G ('2003 suit') against Photran for its failure to pay the loan and a judgment in default ('JID') was entered against Photran. The plaintiff who was the second defendant in the 2003 suit filed his defence and counterclaim whereas the defendant filed applications for summary judgment and to strike out the counterclaim which H were allowed by the Senior Assistant Registrar ('SAR'). The decision was subsequently affirmed on appeal ('2003 judgment'). Further appeal to the Court of Appeal was dismissed. The plaintiff, dissatisfied, applied for leave to appeal from the Federal Court but the application was dismissed. The plaintiff then I pursued further with an application to review the decision of the

Federal Court but that was also dismissed. In the meantime, reverting to the JID against Photran, it transpired that a winding-up order was made against it and upon the plaintiff's application, the Official Receiver for Photran granted sanction to the plaintiff to defend Photran in the 2003 suit. Photran subsequently filed through the plaintiff an application to set aside the JID. The application was dismissed by the SAR but the High Court reversed the decision and allowed the JID to be set aside. The defendant appealed to the Court of Appeal which allowed the appeal, thus affirming the JID against Photran. Before the defendant's appeal was heard by the Court of Appeal, the plaintiff had filed this action to set aside the summary judgment and also to set aside the order made in the OS for the transfer of some properties from the plaintiff to the defendant pursuant to the agreement that the parties had entered into. Hence, this application by the defendant to strike out the plaintiff's suit under O. 18 r. 19(1)(a) of the Rules of the High Court 1980 ('RHC') in encl. 7 and a separate application under O. 18 r. 19(1)(b), (c) and (d) of the RHC in encl. 6. The plaintiff, on the other hand, wanted to preserve his right to file afresh his suit if he were to withdraw his whole suit and hence his application in encl. 15 to withdraw his suit with the liberty to file afresh. The defendant objected strenuously and contended that it was an abuse of the court's process and that the whole suit should be struck out with no liberty to file afresh.

Held (allowing defendant's application in encls. 6 and 7; striking out plaintiff's claim with costs):

(1) The plaintiff's contention that the summary judgment and the OS judgment were decided without hearing the merits of the respective cases was completely flawed and misconceived. In both proceedings, the plaintiff was represented by the same solicitors and the plaintiff had been heard at all levels. (para 14)

(2) The plaintiff has no recourse in law to set aside the summary judgment and the OS judgment. His recourse lied in appeal against the summary judgment taken against him in the 2003 Suit which he had pursued and exhausted to no avail. As for the OS judgment, he had not chosen to appeal and could not now set it aside. Therefore, the plaintiff has no cause of action against the defendant for the relief that he was seeking. (para 23)

(3) By way of the Melaka suit filed by the plaintiff against the defendant and the directors and company secretary of Photran seeking indemnity as a result of the summary judgment obtained against him, the plaintiff has clearly affirmed and accepted the summary judgment. The plaintiff's conduct in having filed the Melaka suit and to commence this suit was an abuse of court process by reason of multiplicity of proceedings. The two inconsistent conduct of the plaintiff was clearly an abuse of process as it was clear that the plaintiff was attempting to relitigate the issues which judgment had been rendered and becomes the truth between parties. (paras 26-28)

(4) It is trite law that the doctrine of *res judicata* is not only confined to issues which the court was asked to determine (cause of action estoppel) but also covers those which ought to have been raised (issue estoppel). Despite having had his opportunity and many days in the court, the courts at all levels found against the plaintiff. It was wrong and an abuse of process for the plaintiff to commence a new action and couch and craft it in essentially the same complaint *ie*, on the indemnity. (paras 32 & 36)

(5) To raise the issues of fraud and illegality when it could have been raised in his defence and counterclaim in the 2003 suit would be to offend the principle of *res judicata*. Clearly such claim would be scandalous, frivolous and vexatious and an abuse of the court process. (para 42)

(6) It is trite law that an action that is brought after the expiry of the limitation period may be struck out for being frivolous, scandalous and vexatious and an abuse of the court process; *Tan Sri Dato' Eric Chia Eng Hock v. NKK Corporation (Japan)* (refd). In the instant case, it was too late for the plaintiff to say that the summary judgment was a nullity as the loan transaction was *ultra vires* the Melaka Enactment No. 4 of 1994 and as such it was void, illegal and unenforceable. Such a defence should have been raised in the 2003 suit. (paras 45 & 46)

(7) The defendant would be extremely prejudiced if the plaintiff was allowed to withdraw his suit with liberty more so when full arguments have been made on all issues. (para 48)

(8) The case of *Hanhyo Sdn Bhd* set out the principle that the court would not compel a plaintiff to continue his action against a defendant if he does not want to do so, provided no injustice is caused to the defendant. Injustice would be caused to the defendant if: (i) the discontinuance was made with ulterior motive to obtain a collateral advantage; (ii) the discontinuance was not made *bona fide* by the plaintiff but it was made in order to obtain an advantage to which he has no right to retain since he has ceased to be *dominis litis* as the defendant has a perfectly good defence; (iii) by the discontinuance of the action the defendant would be deprived of an advantage which he has already gained in the litigation. All the three ingredients were present in the instant case and therefore, to allow the plaintiff to withdraw his suit with liberty to file afresh would cause injustice to the defendant who had already argued fully and firmly on why the suit should be struck out. (paras 50-52)

[Plaintiff's application to withdraw the suit with liberty to file afresh has become academic and hence was struck out with no order as to costs.]

Case(s) referred to:

A Karunathan Arunasalam & Ors v. Pentadbir Tanah Daerah Petaling & Another Appeal [2011] 7 CLJ 130 CA ***(refd)***

Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***

Atkinson v. Fitzwalter And Others [1987] 1 All ER 483 ***(refd)***

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

C (A Minor) v. Hackney London Borough Council [1996] 1 WLR 789 ***(refd)***

Charter Building Company v. 1540957 Ontario Inc [2011] ONCA 487 ***(refd)***

Covell Matthews & Partners v. French Wools Ltd [1977] 2 All ER 591 ***(refd)***

Dato Wira A Nordin Mohd Amin & Ors v. Rajoo Selvappan & Ors [2007] 4 CLJ 421 CA ***(refd)***

Express Newspapers Plc v. News (UK) Ltd and Others [1990] 3 All ER 376 ***(refd)***

Fox v. Star Newspaper Co [1898] 1 QB 636 ***(refd)***
Gan Seng Biang v. Priyamas Export Corporation Sdn Bhd & Anor [2011] 3 CLJ 567 HC ***(refd)***
Greenhalgh v. Mallard [1947] 2 All ER 255 ***(refd)***
Hanhyo Sdn Bhd v. Marplan Sdn Bhd & Ors [1991] 3 CLJ 1783; [1991] 2 CLJ (Rep) 684 HC ***(refd)***
Harapan Permai Sdn Bhd v. Sabah Forest Industries Sdn Bhd [2011] 1 CLJ 285 CA ***(refd)***
Ishak Ismail v. Kenanga Investment Bank Bhd & Ors [2011] 1 LNS 1358 HC ***(refd)***
Ismail Ibrahim & Ors v. Sum Poh Development Sdn Bhd & Anor [1988] 2 CLJ 632; [1988] 1 CLJ (Rep) 606 HC ***(refd)***
Jupiter Securities Sdn Bhd v. Wan Yaakub Abd Rahman [2002] 3 MLJ 264 ***(refd)***
Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor [1997] 3 CLJ 305 FC ***(refd)***
Lissenden v. CAV Bosch Ltd [1940] AC 412 ***(refd)***
Malayan Banking Bhd v. Orbtech Engineering Corporations Sdn Bhd & Ors [2011] 1 LNS 1095 HC ***(refd)***
Mensa Mercantile (Far East) Pte Ltd v. Eikobina (M) Sdn Bhd & Ors [1991] 1 CLJ 772; [1991] 3 CLJ (Rep) 287 HC ***(refd)***
Munusamy Karuppiah v. Sang Lee Company Sdn Bhd & Ors [2010] 3 CLJ 924 CA ***(refd)***
OCBC Bank (Malaysia) Bhd v. Kredin Sdn Bhd [1997] 2 CLJ 534 CA ***(refd)***
Overseas Union Finance Ltd v. Lim Joo Chong [1971] 1 LNS 101 HC ***(refd)***
Pilecon Engineering Bhd v. Malayan Banking Bhd & Ors [2012] 3 MLJ 100 ***(refd)***
Seruan Gemilang Makmur Sdn Bhd v. Badan Perhubungan UMNO Negeri Pahang Darul Makmur [2009] 1 LNS 1457 HC ***(refd)***
Tan Ah Tong v. Perwira Affin Bank Bhd & Ors [2001] 7 CLJ 500 HC ***(refd)***
Tan Sri Dato' Eric Chia Eng Hock v. NKK Corporation (Japan) [2004] 7 CLJ 137 HC ***(refd)***
Tetuan Tanjung Teras & Ors v. Tetuan Syn Tai Hung Trading Sdn Bhd [2003] 7 CLJ 124 HC ***(refd)***
Transbay Ventures Sdn Bhd v. Public Bank Bhd [2007] 7 CLJ 386 HC ***(refd)***
Yayasan Melaka v. Photran Corporation Sdn Bhd & Anor [2007] 7 CLJ 308 HC ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 24
Limitation Act 1953, s. 6(1)
Rules of the High Court 1980, O. 18 r. 19(1)(a), (b), (c), (d)

For the plaintiff/respondent (encls. 6 & 7) - GK Ganesan (KN Geetha & SK Mohan with him); M/s Philip Choong & Co
For the plaintiff/applicant (encls. 15) - GK Ganesan (KN Geetha & SK Mohan with him); M/s Philip Choong & Co
For the defendant/applicant (encl. 6 & 7) - SM Shanmugam (Ainaa Shahirah with him); M/s Lee Hishammuddin Allen & Gledhill)
For the defendant/respondent (encl. 15) - S M Shanmugam (Ainaa Shahirah with him); M/s Lee Hishammuddin Allen & Gledhill)

Reported by Emm Zehra

JUDGMENT

(Enclosures 6, 7 and 15)

Lee Swee Seng JC:

Prologue

[1] The plaintiff in this suit has brought a claim to set aside a judgment entered against him by the defendant by way of summary judgment in the High Court way back in 2003. He had exhausted all avenues of appeal up to the Federal Court where he failed in his leave application to appeal to the Federal Court. He even filed an application to review the refusal of leave to appeal to the Federal Court and that too had been dismissed. There was also another order of the High Court in 2010 made in favour of the defendant in an originating summons matter that the plaintiff also sought to set aside in this suit. In that matter there was no appeal filed whatsoever. Does the law allow for a matter that has been litigated to be relitigated?

[2] The defendant was convinced that the plaintiff do not have a justifiable cause to do that and it applied to have the plaintiff's suit struck out.

Parties

[3] The plaintiff here was a shareholder and director of a company called Photran Corporation Sdn Bhd ("Photran"). The defendant ("Yayasan") is a body corporate incorporated under the Melaka Enactment No. 4 of 1994 and it holds 70% of the issued share capital of Photran. The defendant agreed to be a joint venturer in Photran to manufacture and market high performance

optical and electricity conductive film coated products. Various agreements were signed by the parties to regulate their relationship in Photran. Of relevance to this proceeding would be a loan agreement between the defendant and Photran dated 26 June 1997. By that loan agreement the defendant granted a loan to Photran for RM9.2 million ("Loan"). The loan was to be repaid within 24 months.

[4] The plaintiff also issued to the defendant a "Shareholder Letter of Indemnity" dated 26 July 1997 wherein the plaintiff agreed to indemnify the defendant for the loan in the event that Photran should fail to repay the loan.

Problem

[5] Photran did fail to pay the loan and so the defendant commenced a suit in Kuala Lumpur High Court Suit No: D8-22-1054-2003 ("2003 Suit") against Photran as the 1st defendant (D1) and the plaintiff here as the 2nd defendant (D2) there. Photran, at that time was already controlled by the defendant who had decided not to enter an appearance. A judgment in default was thus entered against Photran.

[6] The plaintiff as D2 in the 2003 suit filed his defence and counterclaim. The defendant here as plaintiff there filed an application for summary judgment and an application to strike out the counterclaim. Both the applications were allowed by the Senior Assistant Registrar ("SAR") and the Deputy Registrar respectively. On appeal the learned judge Abdul Wahab Said J on 25 October 2005 affirmed the summary judgment entered and the striking out of the counterclaim ("2003 judgment"). On appeal to the Court of Appeal by the plaintiff, the Court of Appeal on 12 June 2007 dismissed the appeal with costs and affirmed the 2003 judgment. The plaintiff was undaunted and he applied for leave to appeal from the Federal Court which on 7 January 2008 dismissed his leave application. With dogged determination the plaintiff pursued further with an application to review the decision of the Federal Court in refusing leave. That too was dismissed by the Federal Court on 3 June 2009.

[7] Reverting to the judgment in default ("JID") that was taken against Photran, it transpired that a winding-up order was made against it on 12 August 2008. However the plaintiff saw a glimmer

of hope when on 30 November 2010, upon the plaintiff's application for sanction, the Official Receiver for Photran granted sanction to the plaintiff to defend Photran in the 2003 suit. Photran subsequently filed through the plaintiff an application to set aside the JID on 2 February 2011. On 21 June 2011 the SAR dismissed Photran's application. On appeal the High Court on 19 August 2011 reversed the SAR's decision and allowed the JID to be set aside. The defendant here who was the plaintiff in the 2003 suit appealed to the Court of Appeal which allowed the appeal on 3 January 2012, thus affirming the JID against Photran.

[8] The defendant therefore contended as it were that the final curtain has been drawn, the final chapter written and the cryptic words connoting closure in "The End" having being written where the 2003 suit is concerned. There was nothing to litigate further as the JID dated 20 August 2003 against Photran has been affirmed by the Court of Appeal; the summary judgment dated 25 October 2005 entered against the plaintiff and the plaintiff's counterclaim against the defendant that had been struck out, have also both been affirmed by the Court of Appeal with leave to the Federal Court having being refused.

Prayer

[9] The plaintiff however did not think so and saw a flicker of hope when the JID against Photran was set aside by the High Court. Before Yayasan's appeal was heard by the Court of Appeal, the plaintiff had filed this action to set aside the summary judgment obtained against him and also to set aside the order made in the OS for the transfer of some properties from the plaintiff to Yayasan pursuant to the agreement that the parties had entered into.

[10] The defendant herein has filed an application to strike out the plaintiff's suit under O. 18 r. 19(1)(a) of the Rules of the High Court 1980 ("RHC") in encl. 7 and a separate application under O. 18 r. 19(1)(b), (c) and (d) of the RHC in encl. 6.

[11] At the end of the oral submission by both parties, the plaintiff wanted to preserve his right to file afresh his suit if he were to withdraw his whole suit then and hence his application in encl. 15 to withdraw his suit with liberty to file afresh. The defendant objected strenuously and contended that it is an abuse of the court's process and further that the whole suit should be struck out with no liberty to file afresh.

A **Principle**

Whether The Plaintiff Has A Reasonable Cause Of Action Against The Defendant

B **[12]** Learned counsel for the applicant/defendant Mr SM Shanmugam contended that on the face of the statement of claim, the plaintiff has not disclosed any reasonable cause of action against the defendant based on the principle as enunciated in *Harapan Permai Sdn Bhd v. Sabah Forest Industries Sdn Bhd* [2011] 1 CLJ 285; *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking* C *Corporation Bhd* [1993] 4 CLJ 7 SC.

[13] He further argued that the plaintiff cannot in law set aside a final judgment found on merits ie, summary judgment and OS judgment. This was not a case where the judgments were D obtained in breach of natural justice. In *Transbay Ventures Sdn Bhd v. Public Bank Bhd* [2007] 7 CLJ 386, the plaintiff in that case filed a fresh suit to declare the summary judgment obtained against them as invalid. Abdul Wahab Said J held:

E > From the facts of our case Transbay did proceed with an appeal to the judge and lost. By virtue of this fact, the judgment was not shown to have been obtained in breach of the rules of natural justice. The judgment was neither given *ex parte*, nor was it made in default of the defendant's appearance. The judgment here was made *inter partes* and the plaintiff was very much present by its F advocate from the hearing of the summary judgment application before the senior registrar right up to the appeal before the judge in chambers. The application was fully argued at both levels and the plaintiff lost. The plaintiff through its advocate was accorded all the right to be heard. Clearly it cannot be said that there was G breach of natural justice.

(See also: *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75).

[14] I find merits in that argument. I agree with the defendant's H submission that the plaintiff's contention that the summary judgment and the OS judgment were decided without hearing the merits of the respective cases was completely flawed and misconceived. In both proceedings, the plaintiff was represented by the same solicitors and the plaintiff has been heard at all levels. I Indeed in the summary judgment proceedings the plaintiff was

represented then by the late YM Raja Aziz Addruse, a most able advocate and counsel and fondly cherished as the gold standard of the Malaysian Bar.

[15] The learned judge Abdul Wahab Said J in finding the plaintiff liable under the indemnity and in striking out the plaintiff's counterclaim for being scandalous, frivolous and vexatious and an abuse of process held in *Yayasan Melaka v. Photran Corporation Sdn Bhd & Anor* [2007] 7 CLJ 308 at pp. 318-319 as follows:

> [16] The allegations (of coercion and undue influence) are most untenable and unlikely having regard to the fact that the 2nd defendant, an advocate and solicitor of the High Court of Malaya, is certainly no vulnerable lay person who could have been hoodwinked into entering into an unconscionable bargain. The 2nd defendant himself signed the loan agreement in his position as director of the 1st defendant. It was the 1st defendant, through the 2nd defendant and Bryn who had approached the plaintiff for financial assistance for the loan sum of RM9.2 million. Further, it was the 2nd defendant and Bryn who had persuaded the plaintiff to provide the loan to the 1st defendant. In *Pengiran Othman Shah bin Pengiran Mohd Yusoff v. Karambunai Resorts Sdn Bhd (formerly known as Lipkland (Sabah) Sdn Bhd)* [1996] 1 CLJ 257, the Court of Appeal upheld the striking out the defence under O. 18 r. 19 where the appellant defendant had raised the issue that they were induced by undue influence in executing several agreements. In finding that the arguments on undue influence failed, YA Siti Norma Yaakob JCA (as she then was) supported her finding by stating that the appellants were legally represented and he must go one step further to prove that the other party has used that position to obtain an unfair advantage over him.
>
> [17] The terms of the loan agreement are very favourable to the 1st defendant. The 1st defendant was only required to pay the total interest free loan sum of RM9.2 million within 24 months from date of release of the balance loan of RM4.6 million from 26 June 1997. Indisputably, the 1st defendant benefited from the favourable terms of repayment of the interest free loan.
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> [18] The preparation, finalization and execution of the loan agreement and indemnity and the terms therein contained was carried out under the direct supervision of 2nd defendant. Loan agreement and the indemnity agreement were both signed before Mohamad Jailani bin Khamis, also an advocate & solicitor on 26 July 1997 with 2nd defendant for the company and himself in the indemnity agreement. In other words, 2nd defendant had the benefit of further legal advice. After the letter of demand was

A made on 17 Mac 2003 to 1st defendant and 2nd defendant, the 2nd defendant did not even bother to reply to the letter of demand at the first opportunity available. It was raised by 2nd defendant only in his defence on 28 October 2003 some seven years after execution of those contemporaneous documents. It must be noted that at the time the loan and indemnity agreements were executed, the plaintiff only had 20% shareholding in the 1st defendant. Certainly, the 2nd defendant's allegation of coercion cannot stand in law.

[19] The fact remains that stripped of all the issues that the 2nd defendant has sought to bring, this is a straight forward case involving a loan. 2nd defendant affidavit merely relied on the defence pleaded which are bare allegation. When an assertion is equivocal or lacking in precision or is inconsistent with undisputed contemporaneous documents or inherently improbable, this court has a duty to reject it thereby rendering the issue not triable (see *Bank Negara Malaysia v. Mohd Ismail* [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14). I do not see that coercion or undue influence has anything to do with 2nd defendant decision to sign the loan agreement or the indemnity agreement. This defence is unfounded and rejected.

[16] Perhaps the plaintiff saw a flicker of hope when the High Court set aside the JID in the 2003 suit and indeed this current action was filed after the JID was set aside. See the case of *Yayasan Melaka v. Photran Corporation Sdn Bhd & Anor* [2007] 7 CLJ 308. The plaintiff's argument understandably was that if the principal borrower Photran is not liable yet then he as the one who had issued the letter of indemnity to Yayasan cannot be held to be already liable. Indeed the learned judge Abdul Wahab Said J in *Yayasan Melaka v. Photran Corporation Sdn Bhd & Anor* [2007] 7 CLJ 308 did allude to this in passing at p. 315 as follows:

> As far as the loan agreement is concerned, the plaintiff had obtained judgment in default against the 1st defendant on 12 August 2003. *Until that judgment is set aside that judgment is good as against the 1st defendant and no issue of undue influence or coercion or even want of consideration should be entertained in respect of the loan agreement*. These issues are *res judicata* between the plaintiff and 1st defendant under that judgment. (emphasis added)

[17] It is not difficult to see and therefore say that the plaintiff saw a ray of hope, faint and flickering though it may be that may well change his fortune, when the 2003 judgment was set aside by the High Court. He filed this suit seeing a window of opportunity being opened to him for a revived cause of action. However that was short-lived as the Court of Appeal has subsequently allowed the appeal by *Yayasan*. The JID in the 2003 suit having being affirmed, the position of the plaintiff has not changed at all.

[18] Indeed even if the decision had been affirmed by the Court of Appeal with the JID in the 2003 suit being set aside, the position according to Mr Shanmugam would not changed a bit for an indemnity is different from a guarantee.

[19] According to Mr Shanmugam the liability of Photran in the 2003 suit is of no relevance whatsoever to the plaintiff's liability in the indemnity. In the book *The Modern Contract of Guarantee* by Dr James O'Donovan and Dr John Philips, the learned authors have outlined the effect of a contract of indemnity as follows:

> The performance of an obligation or the payment of a debt of another may be secured not by a guarantee, but by a contract of indemnity. The distinction between a contract of guarantee and a contract of indemnity is that in a contract of indemnity a primary liability is assumed whether or not a third party makes a default whilst, as has been seen, in a contract of guarantee the surety assumes a secondary liability to the creditor for the default of another who remains primarily liable to the creditor. *The contract of indemnity, therefore is "a contract by one party to keep the other harmless against loss" and is not dependant on the continuing liability of the principal debtor. The obligation has no reference in law to the debt of another. In other words, an indemnity imposes a primary obligation which is independent of the continuing obligation of another.* (emphasis added)

[20] Learned counsel for the plaintiff, Mr GK Ganesan, was quick to point out that the letter of indemnity is not activated until there is a default on the part of Photran for which it is held liable to pay. In short the letter of indemnity was in essence a guarantee and liability of the plaintiff would kick in only after Photran has been held liable to pay. The argument is not without some merits for cl. 2 of the letter of indemnity reads:

> 2. In the event the Borrower fails, refuses and or neglects or omits to comply with and or perform all its obligations set out in the Loan Agreement and security documents with you I shall be liable to comply with and to perform the Borrower's said obligations as though I am the Borrower of the Loan.

[21] However, appealing as that argument is, it appears for the moment academic as the JID against Photran in the 2003 suit has been affirmed by the Court of Appeal. Learned Mr GK Ganesan said his client will be arguing for leave to appeal to the Federal Court and if the Federal Court should reverse the decision of the Court of Appeal then the issue of whether the plaintiff could be held liable under the letter of indemnity when no judgment has been entered against Photran would become very much alive. Be that as it may, this court must decide on this case on the facts as they are now and not on the facts as they could be in the future. It is not for this court to speculate on what may happen in the future as and when the Federal Court should hear the matter and decide. As they say let tomorrow take care of itself.

Whether The Court Is Functus Officio And So Cannot Review The Decision In The 2003 Suit And The OS Judgment

[22] Learned counsel for the applicant/defendant also submitted that this court is *functus officio* and cannot review the learned judge's decisions in the summary judgment and the OS judgment. In support of his submission he cited *Munusamy Karuppiah v. Sang Lee Company Sdn Bhd & Ors* [2010] 3 CLJ 924, Abdul Malik Ishak JCA held as follows:

> It is whether JC2 can revise and amend the approved, sealed and perfected order of JC1. It turns on the application of the latin phrase *functus officio*. It is trite that once the order of JC1 has been drawn up and perfected, it cannot be altered, varied, or set aside because the court is *functus officio*. In other words, having decided a question brought before JC1, JC1 is *functus officio*, and cannot review her own decision. *A fortiori* JC2 too cannot review JC1's decision. It is as simple as that.

[23] In the circumstances, I agree that the plaintiff has no recourse in law to set aside the summary judgment and the OS judgment. His recourse lies in appeal against the summary judgment taken against him in the 2003 suit which he had pursued and exhausted to no avail. As for the OS judgment he

had not chosen to appeal and cannot now set it aside when he was heard and judgment entered accordingly. Therefore, the plaintiff has no cause of action against the defendant for the relief that he is seeking.

Whether There Is A Multiplicity Of Proceedings When The Plaintiff Has Filed Another Suit In Melaka High Court Claiming Against The Defendant And The Directors Of Photran For An Indemnity For The 2003 Judgment Entered Against Him

[24] On 6 January 2010, the plaintiff filed a legal action against the defendant and the directors and company secretary of Photran in Malacca High Court Civil Suit No: 22-1-2010 ("Melaka Suit"). In the Melaka suit, the plaintiff amongst others is seeking for an indemnity as a result of the summary judgment obtained against him.

[25] Learned counsel for the defendant submitted that the plaintiff cannot approbate and reprobate. On one hand, he is claiming that he is to be indemnified for the summary judgment in the proceeding of which is still on-going, and on the other hand he has filed this claim seeking for the summary judgment to be set aside.

[26] It was argued and not without some merits that by way of the Melaka suit, the plaintiff has clearly affirmed and accepted the summary judgment. The two inconsistent conduct of the plaintiff is clearly an abuse of process. In *Express Newspapers Plc v. News (UK) Ltd and Others* [1990] 3 All ER 376, Sir Nicholas Brown Wilkinson VC held:

> There is a principle of law of general application that it is not possible to approbate and reprobate. That means that you are not allowed to blow hot and cold in the attitude that you adopt. A man cannot adopt two inconsistent attitudes towards each another: he must elect between them and having elected to adopt one stance, cannot thereafter be permitted to go back and adopt an inconsistent stance.

(See also: *Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor* [1997] 3 CLJ 305; *Lissenden v. CAV Bosch, Ltd* [1940] AC 412; *Charter Building Company v. 1540957 Ontario Inc* [2011] ONCA 487; *A Karunathan Arunasalam & Ors v. Pentadbir Tanah Daerah Petaling & Another Appeal* [2011] 7 CLJ 130).

[27] I agree with the defendant's submission that the plaintiff's conduct in having filed the Melaka suit and now to commence this suit is an abuse of court process by reason of multiplicity of proceedings.

Whether The Current Suit Is Caught By The Doctrine Of Res Judicata

[28] The defendant/applicant also submitted that the plaintiff's claim herein is clearly caught by the doctrine of *res judicata*. According to Mr Shanmugam for the defendant the plaintiff has again raised allegations pertaining to the same subject matter ie, the indemnity which led to the summary judgment and the OS judgment. It is clear that the plaintiff is attempting to relitigate the issues which judgment has been rendered and becomes the truth between parties. I find merits in that argument.

[29] The Supreme Court in *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783, explained the doctrine of *res judicata* as follows:

> What is *res judicata*? It simply means a matter adjudged, and its significance lies in its effect of creating an *estoppel per rem judicature. When a matter between two parties has been adjudicated by a Court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the res judicata, because the judgment becomes the truth between such parties, or in other words, the parties should accept it as the truth; res judicata pro veritate accipitur*. The public policy of the law is that it is in the public interest that there should be finality in litigation – *interest rei publicae ut sit finis litium. It is only just that no one ought to be vexed twice for the same cause of action – nemo debet bis vexari pro eadem causa.* Both maxims are the rationales for the doctrine of *res judicata*, but the earlier maxim has the further elevated status of a question of public policy. (emphasis added)

[30] In *Gan Seng Biang v. Priyamas Export Corporation Sdn Bhd & Anor* [2011] 3 CLJ 567, I had occasion to apply the doctrine when I observed as follows:

> Therefore, the plaintiff's counsel submitted that the judge in allowing the plaintiff's summary judgment had after taking into consideration all those issues that are now raised to oppose this striking-out application, dismissed them. In light of the decision of the court in the summary judgment application, it is evident that the defendant does not have a sustainable counterclaim. The plaintiff further submitted that the defendants should not be allowed to re-litigate the issues already disposed of by the court.

> As for the issues pertaining to the validity of the Memorandum of Understanding dated 30 July 1997, it is pertinent to note that the said issue was decided after a full trial in an earlier proceeding and that the defendants had also withdrawn their appeal. *I find merits in the plaintiff's argument that to hold that the defendants have a sustainable cause of action vide their counterclaim would allow them to re-litigate an issue that had been previously determined, thereby contravening the principle of "res-judicata"*. (emphasis added)

(See also: *Malayan Banking Bhd v. Orbtech Engineering Corporations Sdn Bhd & Ors* [2011] 1 LNS 1095; *Seruan Gemilang Makmur Sdn Bhd v. Badan Perhubungan UMNO Negeri Pahang Darul Makmur* [2009] 1 LNS 1457; *Mensa Mercantile (Far East) Pte Ltd v. Eikobina (M) Sdn Bhd & Ors* [1991] 1 CLJ 772; [1991] 3 CLJ (Rep) 287).

[31] The plaintiff's contention that the defendant failed to disclose those purported facts as alleged in para. 37 of the statement of claim during the 2003 suit is completely untenable and has no basis. If at all the plaintiff thinks that those purported facts alleged are relevant, then the plaintiff ought to have raised the issues in the 2003 suit particularly so when the plaintiff filed a counterclaim. There was nothing preventing those issues from being raised in the 2003 suit.

[32] It is trite law that the doctrine of *res judicata* is not only confined to issues which the court was asked to determine (cause of action estoppel) but also covers those which ought to have been raised (issue estoppel). In *Greenhalgh v. Mallard* [1947] 2 All ER 255 at p. 257 Somervell LJ explained this as follows:

> ... *res judicata* for this purpose is not confined to the issues which the court is actually asked to decide, but ... it *covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them*. (emphasis added)

[33] This extension of the doctrine of *res judicata* to issue estoppel was applied by His Lordship Abdul Malek Ahmad JCA (as he then was) in the Court of Appeal case of *OCBC Bank (Malaysia) Bhd v. Kredin Sdn Bhd* [1997] 2 CLJ 534 at pp. 542

to 544 where His Lordship referred to the helpful explanation given by Simon Brown LJ in *C (A Minor) v. Hackney London Borough Council* [1996] 1 WLR 789 at pp. 792 and 793 as follows:

> Before turning to consider these reasons and Counsel's arguments upon the appeal, it is convenient first to indicate something of the law governing this issue.
>
> From the several authorities referred to during the course of argument I derive these central principles.
>
> (1) The considerations of public policy underlying the plea of *res judicata* are enshrined in two Latin maxims: *nemo debet bis vexari pro una et eadem causa and interest reipublicae ut sit finis litium*.
>
> (2) The plea of *res judicata* encompasses two distinct forms of estoppel: cause of action estoppel and issue estoppel.
>
> (3) "Cause of action estoppel arises where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter.
>
> In such a case the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment:" see *Arnold v. National Westminster Bank Plc.* [1991] 2 AC 93, 104.
>
> (4) Issue estoppel represents an extension of the doctrine of *res judicata* to include a bar on the subsequent litigation not only of all decided issues whose resolution was essential to the determination of earlier proceedings but also *"to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time:"* see *Fidelitas Shipping Co Ltd v. V/O Exportchleb* [1966] 1 QB 630, 643, per Diplock LJ, quoting from *Henderson v. Henderson* [1843] 3 Hare 100, 115. As Lord Keith of Kinkel put it in *Arnold v. National Westminster Bank Plc.* [1991] 2 AC 93, 106:
>
> > *Issue estoppel, too, has been extended to cover not only the case where a particular point has been raised and specifically determined in the earlier proceedings, but also that where in the subsequent proceedings it is sought to raise a point which might have been but was not raised in the earlier.*
>
> (5) "The point" which might have been but was not raised in the earlier proceedings may itself be a cause of action.

In *Talbot v. Berkshire County Council* [1994] QB 290, 301 Mann LJ spoke of the rule as "a salutary one," observing that "it prevents prolixity in litigation and encourages the earliest resolution of disputes."

(6) In issue estoppel cases, the plea of *res judicata* will not be applied where to do so would cause injustice. The "special circumstance" (the phrase used in several of the authorities) justifying the non-application of the rule ordinarily arise where further material becomes available which could not by reasonable diligence have been adduced in the earlier proceedings, or where (as in *Arnold v. National Westminster Bank Plc* [1991] 2 AC 93) there has been a change or changed perception of the law.

(7) The plea of *res judicata* applies only where the cause of action or issue was and remains between the same parties or their predecessors in title. The single exception to this rule is to be found in the Privy Council decision in *Yat Tung Investment Co Ltd v. Dao Heng Bank Ltd* [1975] AC 581, where the party held estopped in the subsequent proceedings had not itself been a party to the earlier action. It was, however, a closely related company with common directors and shareholders. (emphasis added)

[34] The plaintiff through his learned counsel Mr GK Ganesan is now trying once again to raise the issue of fraud on the part of the defendant and a new issue of illegality in that under the Melaka Enactment No. 4 of 1994 under which the defendant was incorporated, the loan agreement was outside the object of the enactment and thus void, unenforceable and illegal under s. 24 of the Contracts Act 1950.

[35] In *Tan Ah Tong v. Perwira Affin Bank Bhd & Ors* [2001] 7 CLJ 500 Abdul Malik Ishak J (as His Lordship then was) held as follows:

The Court of Appeal in *OCBC Bank (M) Bhd v. Kredin Sdn Bhd* [1997] 2 CLJ 534 applied vigorously the doctrine of *res judicata* and held, *inter alia*, that when an issue could and should have been raised in an earlier proceeding, one was precluded from raising it in a subsequent action. Likewise in the present case, the plaintiff – Tan Ah Tong could and should have raised the issue of illegality of the charge at the hearing before NH Chan J (as he then was) in Civil Suit No: S5-31-1641-87 and since the plaintiff did not do so he was precluded from raising it in the present suit … Here the conduct and the inaction of the plaintiff must be construed against him. The illegality issue was raised too late in the day.

[36] I agree with the defendant's submission that the plaintiff has had his opportunity and his many days in court. He was represented by the very best. However, the courts at all levels found against the plaintiff. It is wrong and an abuse of process for the plaintiff to commence a new action and couch and craft it in perhaps better terms on what essentially is the same complaint ie, on the indemnity. Our courts have been rigorous in its rebuke when dealing with repeated and relentless attempts by a party to raise new issues.

[37] In *Pilecon Engineering Bhd v. Malayan Banking Bhd & Ors* [2012] 3 MLJ 100, Her Ladyship Mary Lim J made these pertinent and pungent remarks:

> Similarly, in my judgment, justice requires that no further time or money should be wasted by any of the parties to this litigation which can only end with the failure of the plaintiff's claim. Similarly, I agree that, 'with both in justice and in mercy', we ought to put an end to it. The plaintiff's persistent arguments based entirely on what is essentially the same acts and for the same reasons, though now couched in perhaps better terms due to hindsight, are for intents and purposes the same issues which has been finally adjudicated. Even if there is any difference, it is only in form and is caught by the wider principle of issue estoppel. As observed earlier, this borders on abuse of process and must be halted in its damaging tracks.

[38] In *Ishak Ismail v. Kenanga Investment Bank Bhd & Ors* [2011] 1 LNS 1358, Her Ladyship Zabariah Mohd Yusof J in terminating a litigant's theatrics used the analogy of tirelessly trumpeting the same tune as follows:

> What is pertinent is that, here again in the Suit herein, the plaintiff raised once again that the undertaking was procured from him by purported pressure, threat, coercion and duress. It was also alleged that the undertaking was obtained from him by deception, fraud and without his free consent. The long and shot of all is that the plaintiff is singing the same tune as that in Suit of 1869. These issues in the suit herein are the very same issues that have been raised, litigated and adjudged until the highest court of the country in Suit 1869. The plaintiff already had his day from the High Court, Court of Appeal and the Federal Court. To allow the plaintiff to proceed with the suit herein would offend the principle of *res judicata* … Similarly, the allegation by the plaintiff herein against the defendants are nothing but a ploy and a tactical

> manoeuvre to avoid and delay the execution of the judgment against him which had been pronounced by the highest court in the land. He is certainly grasping at straws to avoid payment to the first defendant … In any event the plaintiff has already had his day in court where all the issues raised herein have been ventilated and adjudicated to its finality until the Federal Court. To allow the claim would be an abuse of process as the claim is clearly frivolous and vexatious.

[39] Allegations of fraud and illegality that were not raised at the earliest opportunity do not generally go down well with the courts. In *Jupiter Securities Sdn Bhd v. Wan Yaakub Abd Rahman* [2002] 3 MLJ 264, it was observed as follows:

> It must be observed that allegations of fraud are of a serious nature and therefore the law had placed a strict condition that if fraud is intended to be raised, if known, ought to be disclosed at the earliest opportunity.

[40] In a similar vein, in *Tetuan Tanjung Teras & Ors v. Tetuan Syn Tai Hung Trading Sdn Bhd* [2003] 7 CLJ 124, Low Hop Bing J (as His Lordship then was) issue the following admonishment:

> The defendants have had every opportunity to plead all the defences available to them in the sessions court but have not done so. The purported application for leave to amend is a delayed rescue operation and is an attempt to have a second bite at the proverbial cherry, thereby turning the defence from one character to a defence of another and inconsistent character. If there is an illustration of an afterthought, this purported defence of illegality would aptly fit the description.

[41] Learned counsel for the defendant Mr Shanmugam also referred my attention to the pertinent observation of Stocker LJ in *Atkinson v. Fitzwalter And Others* [1987] 1 All ER 483 as follows:

> It seems clear from this passage that, in fact, no amendment to allege fraud had ever been made either before the action commenced or during the trial and it is not clear whether such an application was even made before the Court of Appeal. It was in this context that Lord Esher MR made the comments cited. For my part, I doubt if this passage made in a case which it appears that no amendment had ever been made or even sought, does support the general proposition that fraud, if not pleaded initially cannot be raised by subsequent amendment. No doubt it is a proposition which would apply in cases where the facts giving

A rise to the plea of fraud were all known at the time of the original pleading and certainly where the failure to plead such facts could amount to 'over reaching' or where the delay in pleading fraud was in connection with some tactical manoeuvre.

B (See also: *Ismail Ibrahim & Ors v. Sum Poh Development Sdn Bhd & Anor* [1988] 2 CLJ 632; [1988] 1 CLJ (Rep) 606).

[42] To raise these issues of fraud and illegality when it could have been raised in his defence and counterclaim in the 2003 suit would be to offend the principle of *res judicata*. Clearly such claim C would be scandalous, frivolous and vexatious and an abuse of the court process.

Whether The Plaintiff's Claim Is Barred By Limitation

D **[43]** Mr Shanmugam for the applicant/defendant submitted that the summary judgment was obtained on 25 January 2005. The plaintiff alleges that the summary judgment was obtained by fraud or concealment of purported facts. The claim which appears to be based on tort was only filed on 3 November 2011, a period of more than six years from 25 January 2005.

E

[44] In the circumstances, it was submitted that the plaintiff's claim is time barred and therefore an abuse of process (See: s. 6(1) of Limitation Act 1953 and the case of *Dato Wira A Nordin Mohd Amin & Ors v. Rajoo Selvappan & Ors* [2007] F 4 CLJ 421). His Lordship James Foong JCA (later FCJ) observed at p. 433 of the case as follows:

> [18] We shall now proceed to deal with the respondents' second cause of action: conspiracy with the 1st to 5th and 8th defendant G to deprive the plaintiffs of their rights to the said land. When the claim is one of conspiracy then it falls under the emerging tort of conspiracy to do an act resulting in damage to the claimant. Being a tortuous claim, s. 6(1)(a) of the Act has this to say:
>
> > Limitation of actions of contract and tort and certain other H actions.
> >
> > (1) Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say:
> >
> > I (a) actions founded on a contract or on tort; ...
>
> [19] Since this proposed action is brought after this period of six years, it would also fail *in limine* upon a plea of limitation under this provision of the law.

[45] It is trite law that an action that is brought after the expiry of the limitation period to commence the action may be struck out for being frivolous, scandalous and vexatious and an abuse of the court process. Support for this can be found in the case of *Tan Sri Dato' Eric Chia Eng Hock v. NKK Corporation (Japan)* [2004] 7 CLJ 137 where at pp. 141 to 142 His Lordship Hishamuddin J (now JCA) said as follows:

> I have dismissed the plaintiff's appeal with costs. With respect, I accept the defendant's argument. In my judgment, by reason of s. 6(1)(a), the present suit, filed on 2 October 2002, is out of time by a year and is thus frivolous, vexatious and an abuse of the process of the court. In *Ronex Properties Ltd v. John Laing Construction Ltd and Others* [1982] 3 All ER 961, the English Court of Appeal held (at p. 968):
>
> > Where it is thought to be clear that there is a defence under the Limitation Act, the defendant can either plead that defence and seek the trial of a preliminary issue, or in a very clear case, he can seek to strike out the claim on the ground that it is frivolous, vexatious and an abuse of the process of the court and support his application with evidence.
>
> The above decision has been followed by the Brunei High Court in *Zainuddin Dato' Seri Paduka Hj Marsal v. Pengiran Putera Negara Pengiran Hj Umar* [1997] 4 CLJ 233; [1997] 4 MLJ 135.
>
> I have no doubt whatsoever that the present case is a 'very clear case' (to borrow the phrase in *Ronnex Properties*) of the plaintiff's action being out of time, because the plaintiff unequivocally concedes that the suit was filed seven years after the publication of the allegedly defamatory letter.
>
> I accept the submission of the learned counsel for the defendant that in a defamation action, for the purpose of calculating the six years limitation period as stipulated by s. 6(1)(a) of the Limitation Act, time began to run from the date (11 October 1995) of the publication of the defamatory statement to a third party; and not from the date (9 October 1996) when the plaintiff first had knowledge of the allegedly defamatory words.

[46] Likewise it is too late in the day for the plaintiff to now say that the summary judgment is a nullity as the loan transaction is *ultra vires* the Melaka Enactment No. 4 of 1994 and as such it is void, illegal and unenforceable. Such a defence should have been

raised in the 2003 suit. Surely the law does not countenance a case where after the limitation period, the plaintiff wakes up one day with a spark of insight and inspiration to apply to impeach a judgment on a new found ground of illegality which was not previously thought of!

Whether The Plaintiff Can Withdraw A Suit With Liberty To File Afresh After Full Arguments Have Been Made In A Striking Out Application By The Defendant

[47] The plaintiff having filed an application to withdraw the whole suit with liberty to file afresh and that being done after full arguments have been made in the striking out application by the defendant, I had directed further submissions on this point.

[48] The defendant would be extremely prejudiced if the plaintiff was allowed to withdraw his suit with liberty more so when full arguments have been made on all issues. Mr Shanmugam submitted that that was nothing less than a tactical manoeuvre. The plaintiff cannot proceed and withdraw his case as he deems fit. Here, parties have reached a stage where the defendant has challenged the suit amongst others, on clear grounds of *res judicata*. The defendant ought not to be deprived of these challenges particularly when full arguments have been made. In *Overseas Union Finance Ltd v. Lim Joo Chong* [1971] 1 LNS 101, Raja Azlan Shah J (as His Royal Highness then was) held as follows:

> If the applicant here is *dominis litis* then leave to discontinue may be granted. If he is not, then it is unlikely that I would grant him leave to discontinue. I do not think that the applicant is wholly *dominis litis*. He cannot dispose of the case as he thinks fit or allow it to be dismissed or let judgment go by default. The parties have come to a stage where the respondent/chargor has gained an upper hand by an advantage in that he could find flaws in the applicant/chargee's allegations namely the wrong dates in the memorandum etc. and the fact that the reason for wanting a discontinuance is not a very strong one. The respondent/chargor is not to be deprived of these advantages which have made him a well-matched adversary in the arena. Having considered all these points I am of the opinion that the application to discontinue should be dismissed.

[49] Learned counsel Mr Shanmugam also cited *Fox v. Star Newspaper Co* [1898] 1 QB 636, where Chitty LJ held as follows: A

> The principle of the rule is plain. It is that after the proceedings have reached a certain stage, the plaintiff, who has brought his adversary into court, shall not be able to escape by a side door and avoid the contest. He is then to be no longer *dominus litis*, and it is for the judge to say whether the action shall be discontinued or not and upon what terms. I think it would be a great error to construe the rule by reference to the old meaning of the term "discontinuance" or any mere technical sense of words. The substance of the provision is that, after a stage of the action has been reached at which the adversaries are meeting face to face, it shall only be in the discretion of the judge whether the plaintiff shall be allowed to withdraw from the action so as to retain the right of bringing another action for the same subject matter." B C D

(See also: *Covell Matthews & Partners v. French Wools Ltd* [1977] 2 All ER 591; *Hanhyo Sdn Bhd v. Marplan Sdn Bhd & Ors* [1991] 3 CLJ 1783; [1991] 2 CLJ (Rep) 684).

[50] His Lordship Lim Beng Choon in *Hanhyo Sdn Bhd's* case *(supra)* summarised the position of the law as follows at p. 693: E

> The principles that can be extracted from the aforementioned cases are that the Court would not compel a plaintiff to continue his action against a defendant if he does not want to do so provided no injustice is caused to the defendant. Injustice would be caused to the defendant if: F
>
> (1) the discontinuance was made with ulterior motive to obtain a collateral advantage as in the case of *Castanho v. Brown & Root Ltd*; G
>
> (2) the discontinuance was not made *bona fide* by the plaintiff but it was made in order to obtain an advantage to which he has no right to retain since he has ceased to be *dominis litis* as the defendant has a perfectly good defence – see *Overseas Union Finance Ltd v. Lim Joo Chong* [1971] 1 LNS 101 case; H
>
> (3) by the discontinuance of the action the defendant would be deprived of an advantage which he has already gained in the litigation - see *Covell Matthews & Partners v. French Wools Ltd* case. I

[51] This court was of the view that all the above three ingredients are present and that to allow the plaintiff to withdraw his suit with liberty to file afresh would cause injustice to the defendant who had already argued fully and firmly on why the suit should be struck out.

Pronouncement

[52] For the reasons given above I had allowed the defendant's application in encls. 6 and 7 under O. 18 r. 19(1)(b), (c) and (d) of the RHC and under O. 18 r. 19(1)(a) of the RHC respectively. The plaintiff's claim was struck out with costs of RM5,000 for each application.

[53] In the circumstance the plaintiff's application to withdraw the suit with liberty to file afresh has become academic and hence I struck it out with no order as to costs.

Postscript

[54] Whilst every opportunity is given to a litigant to ventilate his claim there is such a thing as accepting the cold reality of defeat. Like all battles in life it must be fought according to the rules. The rules frown upon litigation by instalments. It does not generally allow relitigation after all avenues of appeal have been exhausted. The plaintiff here is not without his remedy as he has already commenced an action for an indemnity from the defendant and his fellow directors for breach of fiduciary duties owing by the defendant's servants to Photran in the Melaka suit that is proceeding to trial. In that sense the battle is not done yet in the continuing saga that has spawned no less than four suits and various appeals, not to mention the bankruptcy action that has resulted in the plaintiff being adjudicated a bankrupt on 16 December 2011.